No. 02-20-CFH Title: Terry L. Stewart, Director, Arizona Department of Corrections, et al., Petitioners
v.
Jerry Dean McCoy

Docketed:
July 3, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jun 18 2002	Petition for writ of certiorari filed. (Response due August 2, 2002)
	Aug 2 2002	Brief of respondent Jerry Dean McCoy in opposition filed.
	Aug 2 2002	Motion of respondent for leave to proceed in forma pauperis filed.
	Aug 14 2002	DISTRIBUTED for Conference of September 30, 2002
	Oct 7 2002	REDISTRIBUTED for Conference of October 11, 2002
	Oct 15 2002	REDISTRIBUTED for Conference of October 18, 2002
	Oct 21 2002	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Oct 21 2002	Petition DENIED. Statement by Justice Stevens respecting the denial of the petition for a writ of certiorari. (Detached opinion.)

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Supreme Court, U.S.
FILED
02 - 20 JUN 18 2002
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No. -

IN THE SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, et al.,
PETITIONERS,

-vs-

JERRY DEAN MCCOY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the First Amendment, as interpreted by this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and its progeny, protect speech in the form of advice given with the intent to further the felonious purposes of a criminal street gang?

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OPINION BELOW

On February 26, 2002, the United States Court of Appeals for the Ninth Circuit affirmed a judgment of the district court granting Respondent's Petition for Writ of Habeas Corpus. (*McCoy v. Stewart*, 282 F.3d 626 (9th Cir. 2002)). Although the stated ground for granting Respondent's habeas petition is insufficiency of the evidence, the Ninth Circuit concluded that Respondent's advice to criminal street gang members regarding how to better run their gang fell within the protection of the First Amendment because it was "mere advocacy of lawlessness, rather than an intentional effort to further illegal activity." A copy of the Ninth Circuit's published opinion is at Appendix A. A copy of the Ninth Circuit's denial of Petitioner's Petition for Rehearing is at Appendix B. A copy of the district court's order granting Respondent's Petition for Writ of Habeas Corpus is at Appendix C. A copy of the Arizona Supreme Court's denial of Respondent's petition for review of the Arizona Court of Appeals' decision affirming his conviction and sentence is at Appendix D. A copy of the Arizona Court of Appeals' published opinion affirming Respondent's conviction and sentence is at Appendix E. (*State v. McCoy*, 928 P.2d 647 (Ariz. App. 1996)).

STATEMENT OF JURISDICTION

Petitioner requests a Writ of Certiorari issue to review the published opinion of the United States Court of Appeals for the Ninth Circuit. (Appendix A.) The Ninth Circuit issued its opinion on February 26, 2002. On March 20, 2002, the Ninth Circuit denied the State of Arizona's petition for rehearing. Petitioner has timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 18 U.S.C. § 1254; and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . .

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Arizona Revised Statutes section 13–2308(A)(3) provides:

> A. A person commits participating in a criminal syndicate by:
>
> . . .
>
> 3. Furnishing advice or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of a criminal syndicate.

STATEMENT OF THE CASE

On March 10, 1994, the State of Arizona charged Respondent with participating in a criminal street gang, a class 2 felony, codified at Arizona Revised Statutes ("A.R.S.") § 13–2308. The State of Arizona also alleged that Respondent had historical prior felony convictions for forgery, receiving stolen property, and possession of marijuana, and that Respondent had committed the charged offense while on release from prison. On August 23, 1994, a jury convicted Respondent as charged. The jurors also found that Respondent had been previously convicted of receiving stolen property and forgery. On September 26, 1994, the trial court sentenced Respondent to an aggravated term of 15 years' imprisonment, citing as aggravating circumstances Respondent's extensive criminal history and the fact that he was on parole at the time of the offense.

On direct appeal in state court, Respondent challenged the constitutionality of A.R.S. § 13–2308 on the ground that the statute is overbroad because it regulates constitutionally protected free speech. Respondent also challenged the sufficiency of the evidence to sustain his conviction. In a published opinion, the Arizona Court of Appeals affirmed Respondent's conviction. *See State v. McCoy*, 928 P.2d 647 (Ariz. App. 1996). The court concluded that the statute was constitutional because words spoken with the requisite intent of the statute are not protected by the First Amendment. Applying the "any rational trier of fact" standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), the court also concluded that the evidence was more than sufficient to sustain Respondent's conviction for assisting a criminal street gang. The Arizona Supreme Court denied Respondent's petition for review on November 21, 1996.

On September 14, 1998, Respondent filed a petition for writ of habeas corpus in the district court for the District of Arizona alleging four grounds for relief, two of which are relevant here: (1) A.R.S. § 13–2308 is unconstitutionally vague and overbroad; and (2) the evidence was insufficient to sustain the verdict. On April 5, 2001, the district court issued an order granting Respondent's habeas petition on

the ground of insufficiency of the evidence. The district court, agreeing with the Arizona Court of Appeals, found that the intent requirement of the statute ensured that it was neither unconstitutionally overbroad nor vague. However, instead of applying the *Jackson* standard of review, the court went on to conduct a First Amendment analysis, citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Under that analysis, the court found that the evidence did not support the conclusion that Respondent "specifically intended" to promote the street gang's felonious purposes with his advice on how to better run the gang. The court found that Respondent's speech, while "incredibly stupid and short sighted," still enjoyed the protection of the First Amendment.

The State of Arizona appealed to the Ninth Circuit, arguing that, based upon the evidence presented at trial, a rational trier of fact could have found Respondent guilty of assisting a criminal street gang, and that the district court erred by failing to afford appropriate deference to the findings of the jury and state appellate courts. Moreover, some of the district court's factual findings regarding the sufficiency of the evidence were contrary to the trial record.

The Ninth Circuit affirmed the district court's grant of Respondent's habeas petition. Applying *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the court reasoned that "timing is crucial," because, to be constitutionally proscribable, speech must incite imminent lawless action. The court concluded that Respondent's advice to criminal street gang members regarding their gang and its operations was closer to "mere abstract advocacy of lawlessness," and was therefore protected speech under the First Amendment. Because the court viewed Respondent's conviction as implicating the First Amendment, it conducted an independent review of the record and did not apply, or even cite, the *Jackson* "any rational trier of fact" standard of review for a sufficiency of the evidence challenge to a state court conviction. The State of Arizona filed a petition for rehearing pointing out facts in the record that satisfied the *Brandenburg* "imminent" language. The Ninth Circuit denied the petition for rehearing on March 20, 2002.

Facts of the Case

In 1993, the "Bratz" was an ongoing criminal street gang (or syndicate) that used threats, intimidation, and violence to maintain and defend its designated turf. Both its former and current members testified that the Bratz was a gang, and that the members would get together on a regular basis. Expert testimony at trial described the characteristics of gangs, and the role of the "OG," or "original" or "older" gangster. The expert explained that the OG is usually not involved in the criminal activity of the gang, but serves as a mentor by providing direction to the gang.

At more than one gang meeting, Respondent advised the Bratz how to run the gang better—so that the gang would be stronger, have more respect, and instill more fear. Respondent's advice included: electing a president, vice-president, and other officers; "jumping out" disloyal members; "courting in" new members; collecting money for bail, parties, drugs, and gang T-shirts; "tagging up" (utilizing graffiti to promote the gang) more; and "clicking up" with other gangs for backup during fights. The gang members actively listened when Respondent gave advice, and followed some of it immediately—electing officers the same day and clicking up with another gang. The Bratz members also followed Respondent's advice by "jumping out" (beating) a disloyal member. Indeed, the Bratz set up their gang the way Respondent said his gang in California had been organized.

Respondent was present at the "courting in" and "jumping out" of Bratz members, which involved beating and kicking them. An expert testified that the presence of an OG, such as Respondent, encouraged violent activity. The expert also testified that gangs "click up" for purposes of "criminal corruption" resulting in violence. Evidence at trial included a photograph of Respondent "throwing" a gang sign associated with the Bratz, another act that encouraged the gang's felonious behavior.

REASONS THE WRIT SHOULD ISSUE

This Court should grant the petition for writ of certiorari because the United States Court of Appeals for the Ninth Circuit has decided an important federal constitutional question in a way that conflicts with other opinions of the Ninth Circuit, as well as opinions of this Court and other federal circuit courts of appeal. Moreover, the Ninth Circuit has improperly hampered the State of Arizona's ability to lawfully and successfully prosecute gang leaders—and cast doubt on the ability of other states and the federal government to do the same.

The Ninth Circuit's opinion in this case misapplies this Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969); conflicts with the Ninth Circuit's recent opinion in *Planned Parenthood v. American Coalition of Life Activists*, 2002 WL 992667 (9th Cir., May 16, 2002); and also conflicts with the Eighth Circuit's opinion in *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978).

In *Brandenburg*, this Court differentiated between speech that is protected by the First Amendment (the abstract advocacy of violence) and speech that is not (that inciting imminent lawless action). In the opinion below, the Ninth Circuit narrowly interpreted this Court's "imminent" language in *Brandenburg* as a time requirement —concluding that because Respondent's speech did not result in immediate lawless action, it enjoyed First Amendment protection. However, in its more recent opinion in *Planned Parenthood*, the Ninth Circuit applied *Brandenburg* differently—defining a "true threat" as one that a "reasonable hearer" would consider real, regardless of when, by whom, or even if, the threat were implemented. Similarly, the Eighth Circuit has applied the "imminent lawless activity" language of *Brandenburg* more as an indication of the seriousness of the speech, rather than as an indication of time.

Arizona Revised Statutes section 13–2308(A)(3) provides as follows:

> A. A person commits participating in a criminal syndicate by:
>
> 3. Furnishing advice or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of a criminal syndicate.

The "intent" requirement of the statute satisfies the First Amendment, as both the Arizona Court of Appeals and the United States District Court for the District of Arizona acknowledged. However, the Ninth Circuit, using the "imminent lawless action" language of *Brandenburg*, found the statute unconstitutional as applied to Respondent. The Ninth Circuit concluded that Respondent lacked the intent required by the statute, thus rendering his advice in the form of speech "mere advocacy of lawlessness" protected by the First Amendment. The absence of particularity in Respondent's advice regarding time or person was central to the Ninth Circuit's conclusion. (Appendix A, at A-9, A-10)

The opinion conflicts with the Ninth Circuit's recent published opinion in *Planned Parenthood v. American Coalition of Life Activists*, 2002 WL 992667 (9th Cir., May 16, 2002). In that case, the court analyzed the meaning of "threat of force" under 18 U.S.C. § 248, the Freedom of Access to Clinics Entrances Act (FACE) when applied to "GUILTY" and "WANTED" posters identifying doctors who had performed abortions. Citing *Brandenburg* as a "benchmark" provided by this Court, but ultimately distinguishable, the Ninth Circuit found "threat of force" under FACE consistent with settled case law that a true threat is "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a *serious expression of intent* to inflict bodily harm upon that person." *Planned Parenthood*, at ___, emphasis added.[1] A statement made under this

1. Page numbers for Westlaw are as yet unavailable. *See* Ninth Circuit Slip. Op. at 7108–11, 7116–17.

definition is not protected by the First Amendment. *Id.*[2] Further, there is no requirement that a true threat be specific to a particular victim or perpetrator—it is the making of the threat with intent to intimidate that violates FACE, not the actual implementation of the threat. *Id.*[3]

In this case, Respondent's advice regarding how to better run a street gang, when viewed in the entire context and under all the circumstances, would lead a reasonable person to foresee that the advice would be interpreted by those to whom it is communicated—gang members—as a serious expression of intent to further the gang's felonious purposes. Moreover, there is no requirement—contrary to the Ninth Circuit's opinion in the instant case—that the advice be specific to a particular victim or perpetrator because it is the act of advising with the intent to help the gang that violates A.R.S. § 13–2308(A)(3), not the actual implementation of the advice. Implementation of the advice, while possibly relevant to prove the ongoing felonious purposes of the criminal street gang, is neither a requirement of the statute, nor essential to First Amendment analysis.

The Ninth Circuit's opinion also brings into question the scope of *Brandenburg*. In *Brandenburg*, this Court stated that the First Amendment protects speech that advocates violence, provided the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action. 395 U.S. at 447. *See also Hess v. Indiana*, 414 U.S. 105 (1973) (reversing disorderly conduct conviction of antiwar protestor who yelled "We'll take the fucking street later (or again)"); *Claiborne Hardware*, 458 U.S. 886 (advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause and, when such appeals do not incite lawless action, they must be regarded as protected speech). However, far from the provocative political speech at issue in those cases, Respondent's advice was criminal conduct evidenced by speech —as was the threat at issue in *Planned Parenthood*—and thus falls

2. Slip. Op. at 7117.

3. Slip. Op. at 7117–18.

outside the protection of the First Amendment. *See also United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982) (First Amendment did not protect defendant's sale of printed instructions in the manufacture of phencyclidine; First Amendment does not provide a defense as a matter of law to using the printed word and encouraging and counseling others in the commission of a crime).

The Ninth Circuit's overly narrow application of this Court's "imminent" language from *Brandenburg* is too narrow and brings it into conflict with the law of other circuits. In *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978), the Eighth Circuit held that although the anti-tax speeches by the defendants did not "incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform." 572 F.2d at 624. The defendants "explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue," therefore the speeches were not entitled to First Amendment protection. *Id.* The *Buttorff* court recognized the principle implicit in the many cases interpreting *Brandenburg*: "Imminent" is more a consideration of *seriousness* than of *time*. Respondent's "how to" advice to criminal street gang members went well beyond mere advocacy of lawlessness and was not entitled to First Amendment protection, regardless of the time that elapsed between the advice and its implementation. *See also, United States v. Kelley*, 769 F.2d 215 (4th Cir. 1985) (First Amendment did not protect defendant's speech in advising his listeners in the preparation of false W-4 forms with the expectation that his advice would be heeded).

The events of September 11, 2001, illustrate that "imminent lawless action," when applied to unprotected speech, is a question of seriousness, rather than time. Speech in the form of advice to terrorists in so-called "sleeper cells" goes beyond political speech and mere advocacy of lawlessness when it becomes a "how to" plan. If the leader of a terrorist cell gives advice beyond advocating that Americans must die, and advises his followers to learn how to fly planes and then fly them into buildings, the speech is not protected by the First Amendment

simply because months, or even years, may elapse before the group's members implement the lawless action incited by the speech. Such advice, given with the intent to incite the action, is "serious," and therefore "imminent," regardless of time considerations. Under the Ninth Circuit's analysis in this case, the terrorist ringleader has committed no crime by advising the terrorists how to do their job. The difference between international terrorists and domestic terrorists—gang members and their advisers—is one of degree, not of kind. The Ninth Circuit analysis bars prosecution of both, to the detriment of society.

This Court should address the application of *Brandenburg* and the "imminent lawless action" requirement to speech delivered with criminal intent because the Ninth Circuit has contorted and misapplied this Court's holding. Further, the holding below conflicts with a more recent decision on the Ninth Circuit and with the far better reasoned *Buttorff* decision issued by the Eighth Circuit.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY DEAN McCOY,	)	No. 01-15700
	)	
Petitioner-Appellee,	)	D.C. No.
	)	CV 98-433-TUC-WDB
vs.	)	
	)	OPINION
TERRY L. STEWART;	)	
GRANT WOODS,	)	
	)	
Respondent- Appellants.	)	

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Argued and Submitted
August 14, 2001—San Francisco, California

Filed February 26, 2002

Before: Henry A. Politz,* Alex Kozinski, and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

* The Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

Individual Rights/Freedom of Speech

The court of appeals affirmed a judgment of the district court. The court held that general speech advising a gang on its operations, its initiation and expulsion practices, and its "tagging," or graffiti activities, interspersed at a social gathering, making it unlikely anyone would act on it imminently and at most advocating lawlessness at some indefinite future time, is mere abstract advocacy of lawlessness protected by the First Amendment.

Appellee Jerry McCoy was indicted in Arizona Superior Court on one count of participating in a criminal street gang. The prosecution, alleged that McCoy, formerly a member of a California street gang, advised members of an Arizona street gang, the Bratz, on at least two separate occasions on how to operate the gang: once at a barbeque at a gang member's house, and once at a party held at the residence of another gang member. He also advised the gang on its initiation and expulsion practices, and its "tagging," or graffiti activities, both criminal offenses. A jury convicted McCoy and he was sentenced to 15 years of imprisonment, with aggravating circumstances including his criminal history and that he was on parole at the time of the offense.

McCoy filed a direct appeal challenging whether the evidence offered at trial was sufficient to sustain his conviction consistent with the protections of the First Amendment. He contended that the evidence was insufficient to show that he specifically intended to further the unlawful goals of the Bratz. The Arizona Court of Appeals affirmed McCoy's conviction. McCoy's petition for review with the Arizona Supreme Court was denied. McCoy's federal habeas petition was granted: the district court found the evidence in the state court trial insufficient to convict McCoy consistent with the requirements of the First Amendment.

The state appealed.

[1] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), courts may grant relief only if the state court's decision was

contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. Under the "unreasonable application" clause, a federal court should grant the writ when the state court's application of clearly established federal law is objectively unreasonable.

[2] The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is protected by the First Amendment unless such speech is directed to inciting or producing imminent
lawless action and is likely to incite or produce such action. A state cannot constitutionally sanction advocacy of illegal action at some indefinite future time. If McCoy's speech truly was mere abstract advocacy of violence and lawlessness, then, his conviction involved an unreasonable application of Supreme Court precedent.

[3] Far from demonstrating a specific intent to further illegal goals, McCoy's speech appeared to fit more closely the profile of mere abstract advocacy of lawlessness. The circumstances of Mc.Coy's speech, interspersed at a barbeque and a social party, made it unlikely anyone would act on it imminently. Moreover, his advice was very general. Because McCoy's speech to the Bratz at most advocated lawlessness at some indefinite future time, and did not incite lawlessness, it was protected by the First Amendment. The Arizona Court of Appeals erred in concluding otherwise. [4] The Arizona Court of Appeal's conclusion that the speech was not protected involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. [5] The district court's grant of the writ had to be affirmed.

COUNSEL

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T.S. Hartzell (argued), Tucson, Arizona, for the appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether words spoken by an admitted former member of a California gang to a group of Arizona gang members could properly be punished by state law or, instead, fell within the protective ambit of the First Amendment.

I

Jerry Dean McCoy was indicted in Arizona Superior Court on one count of participating in a criminal street gang in violation of A.R.S. § 13–2308,[1] a class 2 felony. The prosecution alleged that McCoy, formerly a member of a California street gang called "Toonerville," advised a street gang who called themselves the "Bratz" or "Traviesos" on at least two separate occasions on how to operate their gang: once at a barbeque at Bratz member Eddie Rodriguez's house,[2] and once at a party held at the residence of another Bratz member. A jury convicted him. The trial judge sentenced McCoy to fifteen years of imprisonment, citing as aggravating circumstances his criminal history and that he was on parole at the time of the offense.

McCoy then filed a direct appeal in which he challenged, *inter alia*, whether the evidence offered a trial was sufficient to sustain his conviction consistent with the protections of the First Amendment. He contended that the evidence was insufficient to show that he specifically

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1. At the time of McCoy's alleged advising the statute provided that "A person who violates subsection A, paragraph 1, 2, 3 or 4 of this section for the benefit of, at the direction of or in association with any criminal street gang, with the intent to promote, further or assist any criminal conduct by the gang, is guilty of a class 2 felony." *Id.* § 13–2308(G). Subsection A, paragraph 3, in turn, provided that "A person commits participating in a criminal syndicate by: . . . Furnishing advice or direction in the conduct . . . with the intent to promote or further the criminal objectives of a criminal syndicate . . . ." *Id.* § 13–2308(A)(3).

2. Testimony indicates that McCoy was dating Rodriguez's mother at the time he attended the barbeque.

intended to further the unlawful goals of the Bratz. The Arizona Court of Appeals affirmed McCoy's conviction in an opinion. *See State v. McCoy*, 928 P.2d 647 (Ariz. App. 1996). McCoy's appellate counsel next filed a petition for review with the Arizona Supreme Court, which was denied.

After applying for state post-conviction relief based on claims of ineffective assistance of counsel, McCoy timely filed a petition for writ of habeas corpus in the U.S. District Court for the District of Arizona. The district court granted McCoy's habeas petition; it found the evidence in the state court trial insufficient to convict McCoy consistent with the requirements of the First Amendment.

II

We review a district court's decision to grant or deny habeas relief *de novo*. *See Depetris v. Kuykendall*, 239 F.3d 1057, 1061 (9th Cir. 2001). Because McCoy's conviction implicates the First Amendment we must, as a reviewing court, conduct our own independent review of the record. In so doing, we must exercise independent judgment as to the legal issue of whether McCoy's speech and association were protected. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505–06 (1984); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 916 (1982); *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1251 (9th Cir. 1997).

[1] Because this case comes before us in a habeas posture, however, under the Antiterrorism and Effective Death Penalty Act (AEDPA), we may only grant relief if the state court's decision was "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. §2254(d). McCoy challenges the Arizona court's decision only under the second prong. As we have explained, "[u]nder the 'unreasonable application' clause, a federal court should grant the writ when the state court's application of clearly established federal law is 'objectively unreasonable.' . . . [W]e have held that a judgment is 'objectively unreasonable' when it is clearly erroneous . . . ." *Shackleford v. Hubbard*, 234 F.3d 1072, 1077

(9th Cir. 2000) (citations omitted). That is, McCoy's conviction must stand unless it leaves us with a "'definite and firm conviction' that an error has been committed." *Gunn v . Ignacio*, 263 F.3d 965, 969 (9th Cir. 2001) (citation omitted). *See Brooks v. N.C. Dept. of Corr.*, 984 F. Supp. 940 (E.D.N.C. 1997) (In habeas proceedings under AEDPA "the court must exercise its independent judgment as to the legal issue of whether [a defendant's] words are protected by the First Amendment" but provide "relief only if the [state court's] ruling involved an unreasonable application of clearly established Supreme Court precedent.").

III

McCoy was charged, tried, and convicted based solely on his speech to, and association with, the Bratz. As even the prosecution conceded, "This case is a little unusual in that the actual alleged criminal act is speaking to this gang group." On the other hand, however, McCoy was not some college professor debating the finer points of social organization with a group of students; he was an admitted former gang member discussing the organization of his former gang with members of another street gang. McCoy's conviction thus raises fundamental questions about the kinds of speech which states may constitutionally punish under the First and Fourteenth Amendments.

A

The opinion from McCoy's direct review in the Arizona Court of Appeals is the only written decision from the Arizona court system that attempts to square McCoy's conviction with the First Amendment; the Arizona Supreme Court "denied review of [McCoy's] direct appeal and habeas petition without comment. In this circumstance, we 'look through' the unexplained [Arizona] Supreme Court decisions to the last reasoned decision, the state appellate court's decision, as the basis for the state court's judgment." *Shackleford*, 234 F.3d at 1079 n. 2.

The Court of Appeals observed that the statute under which McCoy was convicted proscribes advising or counseling a street gang only

when these activities are done "with the intent to promote or further the criminal objectives of a criminal syndicate.[3]" *McCoy*, 928 P.2d at 649. This is important, the court continued, because "[w]ords spoken with the intent to cause the commission of a criminal act are not protected by the First Amendment." *Id.* Because the court opined that the evidence sufficiently demonstrated such intent, it found no First Amendment bar to McCoy's conviction:

> Contrary to appellant's assertions, the evidence showed that he did more than merely recount episodes from his California gang days and provide innocent advice on how best to organize the group. He also advised its members to continue their initiation practices, albeit on a more moderate level, and to increase their "tagging," or graffiti activities, both criminal offenses. From this, and from his prior affiliation and experience in another gang, and from his presence at [sic] least one "jumping[-]in," the jury could reasonably infer both his knowledge of this gang's felony criminal activity and his intent to promote the same.

Id. at 650.[4] In this, a habeas proceeding, we must measure this articulated rational against Supreme Court precedent to determine whether McCoy's conviction was reasonable.

B

McCoy argues that his conviction under A.R.S. § 13–2308 was unconstitutional because, at worst, his words to the gang were abstract

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3. Under Arizona law, criminally assisting a criminal street gang requires that the accused both "inten[d] to promote or further the criminal objectives of a criminal syndicate" and "inten[d] to promote, further or assist any criminal conduct by the gang." A.R.S. § 13–2308(C)(3) and (F) (1993).

4. "Jumping people in," "jump-in," and "court-in" are all synonyms used in describe the initiation of a new gang member by current gang members (usually through physical assault). The phrase "jumping people out," "jump-out," and "court-out" refer to the process by which gang members are ejected from the gang, in a manner similar to initiation, by other gang members.

advocacy of lawlessness not direct to inciting imminent lawless action. Thus, he concludes, they were protected under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and its progeny.

[2] In *Brandenburg*, its seminal advocacy case, the Supreme Court held that he "mere abstract teaching" of "the moral propriety or even moral necessity for a resort to force and violence" is protected by the First Amendment unless such speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[5] 395 U.S. 444, 447–448 (1969). Under *Brandenburg* timing is crucial, because speech must incite imminent lawless action to be constitutionally proscriable. Thus, several years later in *Hess v. Indiana*, the Court made explicit what was implicit in *Brandenburg*: a state cannot constitutionally sanction "advocacy of illegal action at some indefinite future time." 414 U.S. 105, 108 (1973). If McCoy's speech truly was mere abstract advocacy of violence and lawlessness, then, his conviction involved an unreasonable application of Supreme Court precedent.

McCoy argues that the "advice" he gave to the Bratz was nothing more than abstract advocacy of an overarching gang philosophy, which lacked any specific intent to further or to promote criminal acts. If anything, McCoy contends, his speech was advocacy of lawlessness at some indefinite future time. McCoy's Opening Brief avers that

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5. Other decisions confirm that speech that advocates, (teaches, or justifies lawlessness in an abstract way is fully protected, so long as it is not directed to inciting imminent lawless action. The protection afforded an individual's abstract advocacy of lawlessness endures even if the individual hopes that someday such lawlessness may occur. *See Noto v. United States*, 367 U.S. 290, 297 (1961) (abstract "advocacy" of Communist philosophy, "even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as . . . indoctrination preparatory to action"); *see also White v. Lee*, 227 F.3d 1214, 1227 (9th cir. 2000) (neighborhood association's publications and speech strongly opposing the conversion of a motel into a multi-family housing unit were constitutionally protected, even though the association's position, if adopted by HUD, would violate the Fair Housing Act). Only speech that is directed to inciting imminent lawless action, and likely to do so, is proscribable under *Bradenburg*.

> No witness at McCoy's trial testified that McCoy ever told him or her to go out and commit a crime. No witness testified that he or she was incited by hearing McCoy's words. No evidence adduced at the trial suggested that McCoy was offering anything more than his own belief or blueprint on how a successful gang should be run.

The record bears out his assertions.

[3] Far from demonstrating a specific intent to further illegal goals. McCoy's speech appears to fit more closely the profile of more abstract advocacy of lawlessness.[6] The circumstances of McCoy's speech—interspersed at a barbeque and a social party, while Bratz members were drinking, chatting and listening to music—made it unlikely anyone would act on it imminently. Moreover, his advice was very general. McCoy's "ideas" about "how to court people out" were abstract in that they were not aimed at any particular person or nay particular time. McCoy advocated that the Bratz court-out girls in a less violent manner at some time in the future, if and when the Bratz decided to court-out one of their female members. In addition, McCoy's suggestion that the Bratz tag up the neighborhood to let their presence be known was given without any recommendation as to how or when to place the graffiti. Because McCoy's speech to the Bratz, like the protestor's speech in *Hess*, at most advocated lawlessness at some indefinite future time, and did not incite lawlessness, it was protected by the First Amendment. We

---

6. McCoy's argument that his speech was mere abstract advocacy would, of course, be undermined if the state could prove that the speech actually caused imminent lawless action. Here, however, McCoy correctly observes that his words did not actually incite anyone to commit a crime. There is no evidence in the record that the Bratz engaged in any crime as a result of his advice. Indeed, there is no evidence that McCoy's speech played any part at all in any crime committed by the Bratz. Cynthia Felix, a Bratz member, testified that she didn't think that the Bratz implemented McCoy's idea about how to court-out girls. No one testified that the Bratz took McCoy's advice about tagging up the neighborhood. And while the evidence demonstrated that members of the Bratz were involved in crimes, nothing indicates that there criminal activity was in any way inspired by or 'proximate' to McCoy's speech.

therefore hold that the Arizona Court of Appeals erred in concluding otherwise.

IV

[4] The above analysis demonstrates that under *Bradenburg* and its progeny, which were decided well before McCoy's conviction became final in 1996, the Arizona Court of Appeals' conclusion that the speech was not protected "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). We recognize that, to succeed under this prong, it is "not enough that a petitioner convinces the court that he has the better of two reasonable legal arguments"; rather, we must be left "with a firm conviction that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous." *Shackleford*, 234 F.3d at 1077 (internal quotation marks omitted). Nonetheless, given the foregoing analysis, we are forced to agree that McCoy's speech, at most, constituted mere abstract advocacy of lawlessness, rather that an international effort to further illegal activity. We thus conclude that McCoy's conviction cannot be squared with the First Amendment as explicated by clearly established Supreme Court precedent.

V

As the district court aptly observed, "While it may have been incredibly stupid and short-sighted for [McCoy] to have offered his opinions and experiences to a group of teen-aged gangster wanna-be's, the Constitution protects even stupid speech." McCoy, No. CIV 98–433-TUC-WDB, slip op. at 8 (D. Ariz. Apr. 4, 2001). We are mindful of the serious problem posed by street gangs,[7] and are entirely

7. See, e.g., Silvia Perez, *Alternatives in Fighting Street Gangs; Criminal Anti-Gang Ordinances v. Public Nuisance Laws*, 13 St. Thomas L. Rev. 619, 619 (2001) (noting that "[g]ang violence continues to be a problem in today's society. Gangs have spread beyond our inner cities into this nation's rural areas, parks, and streets. (continued...)

sympathetic to the efforts of Arizona's legislature to protect its citizens from the efforts of Arizona's legislature to protect its citizens from the evils gangs all too often inflict. On the record before us, however, we must conclude that the First Amendment protected McCoy's speech. To hold that McCoy's speech could be punished merely because he shared with them his prior experiences in a gang, or even advocated the propriety of gang activity generally, would be unreasonable in light of clearly established Supreme Court precedent. Indeed, McCoy's conviction strays dangerously close to a finding of guilt by association. Such a conviction, even in the context of a street gang, cannot be squared with the First Amendment, and thus cannot stand. *See Clairborne Hardware*, 458 U.S. at 920; *Michell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir. 1997), *overruled on other grounds by Santamaria v. Horsley*, 133 F.3d 1242 (1998) (en banc); *see also Hill v. City of Houston*, 789 F.2d 1103, 1113 (5th Cir. 1986) (explaining that "[t]he Constitution does not protect only decent, law-abiding people").

[5] Given the stringent requirements of AEDPA, we hesitate to affirm a grant of habeas where three levels of Arizona Court system have held a conviction proper. We reluctantly conclude, however, that this is one of the rare cases in which our review of the state court's decision leaves us with a "'definite and firm conviction' that an error has been committed." *Gunn*, 263 P.3d at 969 (citation omitted). The district court's grant of the writ is, therefore,

AFFIRMED.

7. (...continued)
The United States spends $20 billion a year treating the victims of gunshot wounds. 'Gang violence is not only tearing at our moral culture and killing our children, it's also picking our pockets.' Gangs exist in 94% of major American cities") (footnotes omitted); *see generally* Steven L. Sachs, Street Gang Awareness: A resource Guide for Parents and Professionals (1977).

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 20 2002
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JERRY DEAN McCOY,	)	No. 01-15700
Petitioner-Appellee,	)	D.C. No. CIV-98-433-TUC-WDB
v.	)	OPINION
TERRY STEWART; GRANT WOODS	)	
Respondents-Appellants.	)	

Before: POLITZ*, KOZINSKI, and O'SCANNLAIN, Circuit Judges.

The Petition for Rehearing is DENIED.

* The Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

APPENDIX C

_____FILED _____ LODGED
_____RECEIVED ____COPY
Apr 5 2001
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
By_____s/_____Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JERRY DEAN McCOY,	)	No. CIV 98-433-TUC-WDB
Plaintiff,	)	**ORDER**
vs.	)	
TERRY L. STEWART, et al.,	)	
Defendant.	)	

Pending before the Court is Petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. Petitioner raises four claims of error: (1) denial of First Amendment rights due to the vagueness and overbreadth of A.R.S. § 13–2308; (2) insufficient evidence; (3) violation of Petitioner's Sixth Amendment rights to confrontation by the admission of hearsay evidence; and (4) ineffective assistance of counsel at trial and on direct appeal.

I. FACTUAL BACKGROUND

Petitioner moved to Arizona from California, where he had been involved in a gang. In Tucson, his girlfriend had a teenaged son who was involved with a group of young people who called themselves the

"Bratz" or "Traviesos." The evidence presented suggests that this group was a street gang, in that they were involved in tagging and other low-level gang activities, but were not particularly organized for the participation in felonious criminal activities. At a barbeque at the girlfriend's home, the Petitioner was heard by several of the Bratz members speaking about his experiences in California gangs. Petitioner told Bratz members that gangs he had been involved with formalized their organizations by electing officers and collecting dues, tagging to establish territory, and "jumping- in and out" members. He also suggested that the group "click up," or establish friendly relations, with neighboring gangs. The State alleged that Petitioner's conduct was intended to further the gang's activities. Petitioner argues that he was involved in banter and that at most he was suggesting that the group be less violent in their activities.

At trial, witnesses testified about three incidents which involved Bratz members: an assault in which a young woman was "jumped out" of the gang by being hit and kicked; a similar assault of a young man when he was "jumped into" the gang; and an alleged drive-by shooting.

The statutes under which Petitioner was convicted in 1994 read as follows:

> § 13-2301. Definitions
> A. For purposes of §§ 13-2302 through 13-2304:
> 2. "Criminal street gang" means a criminal syndicate which is composed of three or more persons an [sic] which engages in or has as its purpose engaging in felony offenses. . . involving physical injury or threats of physical injury. . . .
>
> § 13-2308. [L]eading or participating in a criminal street gang.
> A. A person commits participating in a criminal syndicate by:
> 3. Furnishing advice or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of a criminal syndicate. . . .

Petitioner was convicted of participating in a criminal street gang, a class two felony under A.R.S. § 13–2308 (A) and (G). The trial court imposed an aggravated, fifteen-year sentence, due in part to Petitioner's prior conviction and commission of the offense while on parole.

II. PROCEDURAL BACKGROUND

On direct appeal, Petitioner raised three issuses: (1) The constitutionality of A.R.S. § 13-2308; (2) the sufficiency of the evidence; and (3) improper admission of evidence seized from the homes of Bratz members. On February 13, 1996, the court of appeals affirmed Petitioner's conviction. *State v. McCoy*, 928 P.2d 647 (Ariz.App. 1996). Petitioner's counsel filed for review with the Arizona Supreme Court. Additionally, Petitioner filed an appeal concerning the use at trial of a version of A.R.S. § 13-2308 which was not in effect at the time the charged offenses were committed. On November 19, 1996, the Arizona Supreme Court denied review of both petitions and the mandate was issued on December 30, 1996.

Petitioner also filed for post-conviction relief, arguing ineffective assistance of counsel at trial and on appeal, because counsel failed to raise the issue of the use of the incorrect version of A.R.S. § 13-2308. The day of filing, November 14, 1996, the trial court dismissed the petition in a minute order, finding that neither prong of *Strickland v. Washington*, 466 U.S. 668 (1984), had been met. Petitioner did not receive a copy of the minute entry, and so did not file for review of the trial court's order denying relief within 30 days. He did file a motion requesting leave amend or supplement on November 27, 1996. He then filed a notice that he would not supplement on December 18, 1996, in which he requested that the State be ordered to respond to the Rule 32 petition. The trial court did not rule on this motion, so the Petitioner filed a Special Action with the court of appeals to compel the trial court to rule on the petition in February 1997. A response was filed in early March 1997, at which point he received notice of the November 14th minute entry. He then filed a petition for review on April 1, 1997, which was denied by the court of appeals as untimely. The Arizona

Supreme Court denied review of this decision and a mandate issued on September 9, 1997.

III. STATUTE OF LIMITATIONS

A state prisoner must file an application for writ of habeas corpus within one year after the date on which judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). For claims adjudicated before the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the deadline was April 24, 1997. However, the statute of limitations is tolled during the pendency of properly filed applications for state post-conviction relief. 28 U.S.C. § 2244(d)(2). Petitioner filed this Petition on September 4, 1998. The State argues, however, that because no petition for relief was properly filed between November 14, 1996, and April 1, 1997, 92 days should be subtracted from the one year tolling period. Under this calculation, the petition should have been filed on June 9, 1998, and is untimely.

The evidence presented by Petitioner concerning his perseverance in obtaining Rule 32 review, specifically the motion to supplement, the notice that he would not supplement and the filing of a special action to compel an answer, suggest that Petitioner did not know that the trial court had denied his petition for post-conviction review. Equitable tolling is appropriate in this situation. *See Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir.1999) ("When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate.") Thus, the Court will review Petitioner's claims on the merits.

IV. ANALYSIS OF CLAIMS

Under the AEDPA, 28 U.S.C. § 2254(d), habeas relief may only be granted when the state court's decision was (1) contrary to clearly established Federal law or involved an unreasonable application of that law, or (2) resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the State court proceeding.

A. Exhaustion of State Remedies

A federal court may not grant a petition for writ of *habeas corpus* unless the petitioner has exhausted the state court remedies available to him. 28 U.S.C. § 2254(b); *Castille v. Peoples*, 489 U.S. 346 (1989). The exhaustion inquiry focuses on the availability of state court remedies at the time the petition for writ of *habeas corpus* is filed in federal court. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

A *habeas* petitioner may exhaust his claims in one of two ways. First, a claim is exhausted when no remedy remains available to the petitioner in state court. *See* 28 U.S.C. § 2254(b)(1)(A). Second, a claim is exhausted if there is an absence of available state corrective process or circumstances exist that render such process ineffective to protect the rights of the petitioner. 28 U.S.C. § 2254(b)(1)(B).

Federal *habeas* review also requires that a petitioner fairly present his federal claim to the state courts. *See Picard v. Connor*, 404 U.S. 270 (1971). A prisoner fairly presents a claim if he has described the factual and legal bases for the claim. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). Mere similarity between a claim raised in state court and a claim in a federal *habeas* petition is insufficient to exhaust. *See id.* Fairly presenting a claim requires that a state prisoner "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. If this is not done, the claim is barred from federal review.

Petitioner's first three claims were properly presented to both the state court of appeals and Supreme Court and have therefore been exhausted. In its Answer, the State argues that the fourth claim, ineffective assistance of counsel, has not been exhausted because it had not been properly presented to the State Supreme Court. Since the filing of the State's answer, however, the Ninth Circuit has found that

in *habeas* petitions, other than those concerning life sentence or capital cases, the claims of Arizona state prisoners are exhausted once the Arizona Court of Appeals has ruled. *See Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999). Petitioner's ineffective assistance of counsel claim was presented to the court of appeals, which incorrectly found that the appeal was untimely. The Court will consider this claim.

B. Constitutionality of A.R.S. §13-2308

The Arizona court of appeals held A.R.S. § 13–2308 was not unconstitutionally overbroad or vague because it only criminalizes criminal conduct evidenced by speech. "[B]ecause the statute clearly applies to appellant's conduct, assuming that the state could prove the requisite intent, he has not standing to complain that its asserted vagueness infringes the rights of others." *McCoy*, 928 P.2d at 649.

The United States Supreme Court's standards on these issues are such: (1) the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep; and (2) even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The vagueness and overbreadth doctrine is clearly inappropriate in this instance because the statute contains a *mens rea* requirement.

C. Sufficiency of the Evidence

However, a *mens rea* requirement (here, the intent to promote or further criminal objectives) does not alone immunize the statute and its application from scrutiny under the First Amendment. The right to associate and speak, even in the context of what some may consider a gang, does not lose its constitutional protection because some of the members of the group have participated in conduct or advocated actions

that is not protected. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982). When illegal conduct occurs in the context of a generally constitutionally protected activity, such as speech or association, then there must be "precision of regulation." *Id.* at 916 (citations omitted). Thus, to punish illegal conduct related to association with a group with both legal and illegal aims, there must be "clear proof that a defendant specifically intend[ed] to accomplish [the illegal conduct]." *Id.* at 919, *citing Scales v. United States*, 367 U.S. 203, 229 (1961) (internal quotations omitted). For liability to be imposed by reason of association, the court must determine that group held unlawful goals and the individual held a specific intent to further those illegal aims. *Id.* at 920 (emphasis added). Accordingly, this Court has searched the trial transcripts to determine whether the prosecution offered the jury sufficient evidence for it to find that Petitioner specifically intended to further the Bratz' alleged goal to commit felonies.*

A review of the evidence presented must show that the State has not attempted to forbid free speech, including speech that advocates the use of force or violation of law, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Id.* at 927-28. It appears the State could not make this showing. In its opening argument at trial, the prosecution stated:

> You will not hear evidence in this case, I should tell you up front, that Jerry McCoy helped to plan or to advise the Bratz or Traviesos gang, instruct them in the commission of a particular crime, such as an assault, or a particular murder, or a particular theft, or a particular drug deal. You will not hear testimony and

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* "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial finding of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 924 (1982) (internal citations omitted.)

you will not see evidence that McCoy participated in the commission of a particular assault or a particular robbery or a particular theft or a particular drug deal.

At trial, the State produced evidence from several of the members of the Bratz of what the Petitioner had said concerning the organization of the gang. When asked whether the Petitioner ever told that they should have a secretary, president and sergeant at arms, John Garibaldi replied that "he never said we should; he said that is how his gang was run." When asked whether the Petitioner told them to commit crimes, the same witness answered no. Another witness, Cynthia Felix, testified that the Petitioner told them they needed to be more gentle when courting-out members, particularly girls. Yet another witness, Jessica Ruiz, admitted that the Petitioner told them they needed to avoid fighting with neighboring gangs and create alliances.

As a predicate to commission of A.R.S. § 13–2308, leading or participating in a criminal street gang, Petitioner must have furnished advice or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of the gang. The definition of a criminal street gang presupposes that those criminal objectives are felony offenses. However, the State relied on only three incidents as the underlying criminal activities — the assault on a former Bratz female member by members of the gang, the courting-in of a male member, and an altercation between Bratz members and another gang that may have involved the use of a handgun. However, none of the gang members who participated in the assault appear to have been prosecuted and the evidence of the handgun incident came from the girl who was assaulted. Thus, it appears that the underlying requirement that the gang have perpetrated a felony, had done so at the direct behest of the Petitioner, and the Petitioner specifically intended that result, was not proven at trial. While it may have been incredibly stupid and short-sighted for the Petitioner to have offered his opinions and experiences to a group of teen-aged gangster wanna-be's, the Constitution protects even stupid speech.

D. Admission of Hearsay Evidence

Petitioner has claimed that the use of notes, letters and photographs discovered at the homes of Bratz members was an admission of hearsay evidence for which a proper foundation had not been laid that violated his Sixth Amendment right to confrontation. This claim was addressed by the Arizona court of Appeals in Petitioner's direct appeal. The court held that the writing on the exhibits was not offered to prove the truth of any of the words contained in them, but rather was offered as evidence of the knowledge and participation of the Petitioner in the activities of the Bratz. The court therefore found that the evidence was not hearsay and the identity of the author was irrelevant.

The Court of Appeals relied on Arizona evidentiary law in making its determination that the hearsay rule had not been violated. This Court may not review a state court's interpretation or application of its own laws, and Petitioner has offered no evidence of differing federal authority. *See Estelle v. McGuire*, 502 U.S. 62, 69 (1991). Thus, under the AEDPA, 28 U.S.C. § 2254(d), habeas relief may not be granted because the state court's decision was neither (1) contrary to clearly established Federal law or involved an unreasonable application of that law, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

E. Ineffective Assistance of Counsel

Petitioner claims that his trial counsel was ineffective because he failed to realize that the parties proceeded to trial under an incorrect version of the statute. Two requirements must be met for a finding of ineffective assistance of counsel: (1) counsel's performance must have fallen below objective standards of reasonableness and been "outside the range of professionally competent assistance;" and (2) counsel's deficient performance must have prejudiced the prisoner by creating a reasonable presumption, absent the errors, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). Assuming that it was

below the standard of reasonable advocacy for the wrong statute to have been applied, Petitioner still cannot show that he was prejudiced by the error. The difference between the two statutes is slight and most likely would not have affected his conviction.

V. CONCLUSION

Accordingly,

IT IS HEREBY **ORDERED** that Petitioner's Petition for Writ of Habeas Corpus is **GRANTED** on Petitioner's second claim of error, insufficiency of the evidence.

IT IS FURTHER **ORDERED** that Petitioner shall be released from custody no later than April 18, 2001.

DATED this 4 day of April, 2001.

S/

William D. Browning
Senior United States District Judge

APPENDIX D

SUPREME COURT
STATE OF ARIZONA

Noel K. Kessaint
Clerk of Court

Kathleen E. Kempley
Chief Deputy Clerk

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone: (602) 542-9396

November 21, 1996

RE: STATE OF ARIZONA vs. JERRY DEAN McCOY
Supreme Court No. CR-96-0356-PR
Court of Appeals No. 2 CA-CR 94-0510
Pima County No. CR-44875

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 19, 1996, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED:[Supplemental] Petition for Review = **DENIED**.

Record returned to the Court of Appeals, Division Two, Tucson, this 21st day of November, 1996.

NOEL K. DESSAINT, Clerk

TO:

Hon. Grant Woods, Arizona Attorney General
Attn: Paul J. McMurdie, Esq., and Dawn M. Northup, Esq.
Thomas F. Jacobs, Esq.
Jerry Dean McCoy, DOC 108159, Arizona State Prison-Florence, Central Unit
Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two, Tucson
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)		
	)	2 CA CR 94-0510
Appellee,	)	
	)	
v.	)	OPINION
	)	
JERRY DEAN MCCOY,	)	
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-44875

Honorable Richard D. Nichols, Judge

AFFIRMED

Grant Woods, The Attorney General
By Paul J. McMurdie and Dawn M. Northup — Phoenix

Attorneys for Appellee

Law Offices of Thomas Jacobs
By Thomas Jacobs — Tucson

Attorney for Appellant

P E L A N D E R, Judge.

Appellant was convicted by a jury of participating in a criminal street gang, a class two felony. A.R.S. § 13–2308(A) and (G). The trial court imposed an aggravated, fifteen-year sentence, enhanced by one prior conviction and appellant's commission of the offense while he was on parole. Appellant raises three issues on appeal, none of which requires reversal.

Viewed in the light most favorable to sustaining the jury's verdict, ***State v. Atwood***, 171 Ariz. 576, 832 P.2d 593 (1992), ***cert. denied***, 506 U.S. 1084 (1993), the relevant facts are as follows. Appellant moved to Tucson from California, where he had been a member of a gang since the 1980s. In Tucson, he became acquainted with his girlfriend's son and a number of his friends who belonged to a gang called the "Bratz." Several Bratz members testified that appellant was present at a barbecue at the son's house attended by a number of Bratz members and that he spoke to them about his experiences in the California gang. He advised them to formalize their gang by electing officers, collecting money to establish a bail fund for members, and spray panting more gang graffiti to make their presence known in their territory. He also advised them to "jump in" more loyal members and "jump out" those who were not loyal. There was testimony explaining that "jumping" or "courting" meant initiating a new member or removing a current member by means of a group beating in which a number of members participated in beating or kicking the person "jumped" or "courted." Finally, he advised them to establish friendly relations with other gangs who would support them.

Several witnesses also testified about three violent incidents involving Bratz members. First, C.C. and several members testified about their participation when C.C. was "jumped out" because she was allegedly disloyal to the gang. This was accomplished by four or more of the female members beating her and then kicking her when she fell to the ground. As a consequence, at least two of the participants were convicted of or adjudicated delinquent on charges of aggravated assault. Other witnesses testified about a similar beating of a male member, and a photograph was introduced into evidence showing his "jumping in" as appellant stood nearby. Finally, several witnesses testified about a

drive-by shooting by a male Bratz member aimed at members of another gang who were "flashing" gang signals at him.

The statutes under which appellant was charged provided, at the time of this offense,[1] as follows:

§ 13–2301. Definitions

A. For purposes of §§ 13-2302 through 13–2304:

* * *

2. "Criminal street gang" means a criminal syndicate which is composed of three or more persons and which engages in or has as its purpose engaging in felony offenses included in chapter 34 of this title or felony offenses included in chapter 34 of this title or felony offenses involving physical injury or threats of physical injury.[2]

* * *

C. For the purposes of this chapter:

* * *

2. "Criminal syndicate" means any combination of persons or enterprises engaging, or having the purpose of engaging, on

---

1. Both appellant and the state have based their arguments about the constitutionality of the statutes on their current version, which is the result of amendments that became effective after this offense occurred. Our decision is based on the statutes as they read prior to the 1994 amendments. *See* 1994 Ariz. Sess. Laws, ch. 200, §§ 13 and 14.

2. We are aware that this definition was not made expressly applicable to § 13–2308. The jury was instructed based on this definition, however, and appellant does not appear to have objected to this instruction.

a continuing basis in conduct which violates any one or more provisions of any felony statute of this state.

§ 13–2308. Participating in or assisting a criminal syndicate; leading or participating in a criminal street gang

A. A person commits participating in a criminal syndicate by:

3. Furnishing advice or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of a criminal syndicate. . . .

* * *

G. A person who violates subsection A, paragraph 1, 2, 3 or 4 of this section for the benefit of, at the direction of or in association with the intent to promote, further or assist any criminal conduct by the gang, is guilty of a class 2 felony.

Appellant first contends that § 13–2308 is unconstitutionally overbroad because it regulates constitutionally protected free speech. Further, he argues, even if his "speech" were not protected because of its content, the statute is unconstitutionally vague "in its limits and proscriptions." As to the first point, it is clear that the statute does not criminalize constitutionally protected speech but, rather, proscribes criminal conduct evidenced by speech. Contrary to appellant's contention, his conviction was not predicated simply on his act of advising or counseling the gang as to noncriminal matters. The statute proscribes such advice as to noncriminal matters. The statute proscribes such advice only when it is given "with the intent to promote or further the criminal objectives of a criminal objectives of a criminal syndicate." A.R.S. § 13–2308(A)(3).[3] Words spoken with the intent to cause the

3. This provision of the statute also answers appellant's complaint that it contains no requirement that the defendant be aware that the group to which he is speaking is (continued...)

commission of a criminal act are not protected by the First Amendment. ***State v. Crisp***, 175 Ariz. 281, 855 P.2d 795 (App. 1993); ***State v. Padilla***, 169 Ariz. 70, 817 P.2d 15 (App. 1991). And, because the statute clearly applies to appellant's conduct, assuming that the state could prove the requisite intent, he has no standing to complain that its asserted vagueness infringes the rights of others. ***Parker v. Levy***, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); ***State v. Tocco***, 156 Ariz. 116, 750 P.2d 874 1988).

Appellant next argues that the trial court erred in denying his motion for directed verdict of acquittal, made pursuant to Ariz. R. Crim. P. 20, 17 A.R.S., because the state had failed to prove that the Bratz was a criminal syndicate or criminal street gang or that appellant's advice to the Bratz was intended to further the gang's criminal objectives. A defendant is entitled to a judgment of acquittal only if there is no substantial evidence to warrant a conviction. ***State v. Hallman***, 137 Ariz. 31, 668 P.2d 874 (1983). The test is whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Appellant apparently argues that the Bratz was merely a group of teenagers who wanted to be in a gang, that they committed only misdemeanors, and that they neither committed nor intended to commit felonies. The record belies this contention. Specifically, the evidence showed the Bratz committed at least three felony offenses involving physical injury or the threat thereof, one of which was committed in appellant's presence. Moreover, the evidence supported a finding that the Bratz committed aggravated assaults on an ongoing basis as part of their ritual for initiating new members and ousting disloyal members. Thus, the evidence was more than sufficient to permit the jury to find

3. (...continued)
a criminal street gang or criminal syndicate. Such knowledge is unnecessary, what is required is that the defendant know of the criminal objectives of the group and intend to promote or further them.

that the Bratz was both a criminal syndicate and a criminal street gang within the meaning of the applicable statutes.

The same is true with respect to the element of intent. Contrary to appellant's assertions, the evidence showed that he did more than merely recount episodes from his California gang days and provide innocent advice on how best to organize the group. He also advised its members to continue their initiation practices, albeit on a more moderate level, and to increase their "tagging," or graffiti activities, both criminal offenses. From this, from his prior affiliation and experience in another gang, and from his presence at at least one "jumping in," the jury could reasonably infer both his knowledge of this gang's felony criminal activity and his intent to promote the same. The trial court properly denied the motion for directed verdict.

Finally, appellant contends that the trial court erred in admitting certain notes, letters, photographs, and a "roll call," all with gang logos and insignia on them, which were seized from the homes of several of the gang members. He argues that they were inadmissible hearsay and that they were admitted without proper foundation as to who had authored the writing found on them. We reject both arguments. The writing on these exhibits was not offered to prove the truth of any of the words contained therein, but rather as evidence of the knowledge and participation of the possessor. For that reason, they were not hearsay, and the identify of their author was irrelevant. ***See generally*** M. Udall, *et al., Arizona Practice*: *Law of Evidence* § 122 (3rd ed. 1991); ***see also United States v. Jaramillo-Suarez***, 950 F.2d 1378 (9th Cir. 1991).

We have reviewed the entire record for fundamental error and have found none. We therefore affirm appellant's conviction.

_____
JOHN PELANDER, Judge

CONCURRING:

/s/ _____
JOSEPH M. LIVERMORE, Presiding Judge

/s/ _____
LLOYD FERNANDEZ, Judge

Supreme Court, U.S.
FILED
AUG 2 2002
CLERK

NO. 02-20

IN THE

SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, *et al*,

Petitioners,

v.

JERRY DEAN McCOY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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BEST AVAILABLE COPY

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals decide correctly, when it affirmed the decision of the United States District Court, that the conviction of Jerry McCoy in an Arizona trial court was based on evidence insufficient to sustain that conviction?

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IN THE

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Petitioners,

v.

JERRY DEAN McCOY,

Respondent.

BRIEF IN OPPOSITION
TO
PETITION FOR WRIT OF CERTIORARI

Respondent Jerry Dean McCoy, through counsel, respectfully requests this Court deny the petition for writ of certiorari and decline to issue a writ to review the judgment and opinion of the Ninth Circuit Court of Appeals in *McCoy v. Stewart*, 282 F.3d 626 (9th Cir.2002).

STATEMENT OF THE CASE

Indicted by a Pima County, Arizona grand jury on March 10, 1994, for the crime of assisting a criminal syndicate, alleged to have occurred between June and September of 1993, Mr. McCoy went to trial in the superior court of Pima County, Arizona on August 16, 1994. The jury returned a guilty verdict on the single count on August 23, 1994. The verdict, combined with enhancement allegations by the state, and aggravating factors found by the sentencing judge, resulted in a sentence of fifteen years imprisonment for Jerry McCoy. Sentence was imposed on September 26, 1994.

Mr. McCoy appealed the verdict and sentence. The Arizona Court of Appeals, in a published opinion, affirmed the judgment and sentence of the trial court on February 13, 1996. Jerry McCoy petitioned the Arizona Supreme Court for review of the case, through counsel, on June 27, 1996 and, *in propria persona*, on May 17, 1996. The Arizona Supreme Court denied review, without comment, on November 21, 1996.

Jerry McCoy then petitioned the trial court for post-conviction relief on November 14, 1996. The trial court denied the petition the day of filing. Mr. McCoy, who received no notice of the denial, continued to pursue this remedy. Ultimately, the matter went to the Arizona Supreme Court, which denied review of the matter.

Jerry Dean McCoy timely filed a federal petition for writ of habeas corpus on September 4, 1998. The district court granted his petition on April 5, 2001. The State of Arizona appealed the district court's decision to the Ninth Circuit Court of Appeals, who

affirmed the district court's decision in the opinion now challenged by Arizona.

Statement of Facts

An Arizona grand jury indicted Jerry Dean McCoy on March 10, 1994. The indictment contained one count--participating in a criminal street gang in violation of Arizona Revised Statute (hereinafter, "A.R.S.") § 13-2308(A)(3).[1] other statutes cited in the indictment classified the grade of the offense and authorized imprisonment and fines.

Jerry Dean McCoy maintained he was innocent of the charge and went to trial, in Pima County (Arizona) Superior Court on August 16, 1994. From the beginning of the trial, it was obvious the state's evidence against McCoy consisted mostly of his association with persons who identified themselves as members of the "Bratz," or "Traviesos."

During jury selection and again in opening argument, the prosecutor admitted the state's case was more conceptual than factual. In explaining why he struck a juror, the prosecuting attorney commented:

> Well, we feel that -- I know that this is difficult to put into words, but I just got the sense from Ms. Delavara that she was a -- or is, and I could be wrong about this, but I got the feeling that she is a person who is rather coarse and has lived a tough life in some ways and just may not be that sensitive to the kinds of issues that we are trying to raise and persuade the jury about in this case. *We are not talking about an egregious murder or robbery or a rape or that kind of a crime in this case, and I got the sense that Ms. Delavara would not be that receptive to a crime which is as much a matter of concept as is a matter of -- a matter of fact.* And for those reasons we just did not feel that Anita Delevara was a good juror for this kind of a case with these kinds of issues presented by the charge we are bringing here. (emphasis added).

[1] Interestingly, at the time of the offense alleged in the indictment, there was no such crime as "participating in a criminal street gang." A.R.S. § 28-2308(A)(3) outlawed furnishing advice to a criminal syndicate. The term "criminal street gang," as defined by A.R.S. § 13-2301(A)(2), the only definition in effect in 1993, applied only to allegations of loan-sharking.

In his opening statement, the prosecutor continued explaining the case in this vein, telling the jury the evidence would not show that McCoy gave any advice or encouragement to the group on committing crimes, but simply, through his communication with the group, a supposed gang, contributed to their cohesion.

> The Defendant's crime was, as the evidence will show, that he strengthened this Bratz gang by giving them advice and encouragement and sharing his knowledge and experience that he had gained from being a member of the Toonerville gang years ago. The evidence will show further that McCoy helped to expand the numbers of the Bratz gang and helped tighten the bonds between members of the gang, knowing full well from his experience in Los Angeles that the Bratz gang would expand and expand its influence by violence and intimidation. The evidence will show that certainly that as Mr. McCoy's intent.
>
> You will not hear evidence in this case, I should tell you up front, that Jerry McCoy helped to plan or to advise the Bratz or Traviesos gang, or instruct them in the commission of a particular crime, such as assault, or a particular murder, or a particular theft, or a particular drug deal. You will not hear testimony and you will not see evidence that McCoy participated in the commission of a particular assault or a particular robbery or a particular theft or a particular drug deal. That is not what this case is about.

The state's first witness, Tucson Police Department Detective Christopher Cuestas, identified himself as an expert in youth street gangs. In summary, his opinion was that the Bratz was a gang and that McCoy could have filled a role as a mentor to the gang's young members. Cuestas opined on who were members of the gang and identified graffiti he believed was made or on behalf of gang members. He laid a foundation for photographs

showing McCoy with young people Cuestas believed were gang members.

Detective Cuestas testified he interviewed Jerry McCoy on March 2, 1994. In the interview, McCoy denies advising or directing any of the individuals identified by Cuestas as gang members. He admits talking to them about his experiences years before as a gang member in California.

None of the witnesses called at McCoy's trial provided any testimony that McCoy advised or directed them in furtherance of any criminal objectives. John Garibaldi testified that he had been jumped-into the Bratz, was a member of the Bratz during the summer of 1993, and had seen Jerry McCoy when he was with other people. Garibaldi testified that at sometime--he did not remember when--McCoy related to someone how the gang McCoy once belonged to was run. The gist of McCoy's reminiscence was that his gang had elected officers. Garibaldi recalled that for about a week or two, some people kicked around the idea of having officers and then recalled he had earlier said a secretary and a president had been selected.

At the end of his testimony, Garibaldi admitted that McCoy had never said anything directly to him about gangs. He only heard from others what they had said McCoy had said.

The state's next witness, Cynthia Felix, claimed she was a member of the Bratz in the summer of 1993. Felix remembered McCoy talking, sometime that summer, about not hurting people when jumping them into and out of the gang. McCoy also mentioned electing officers and having members chip into a kitty. Felix remembered that none of the gang

members followed any of McCoy's ideas.

The next witness, Lisa Acosta, admitted she was a member of the Bratz from sometime in early-1993 to, at least, the time of trial. Ms. Acosta recalled meeting Jerry McCoy at a barbeque, but did not remember McCoy ever saying anything about how gangs operate.

Elena Otero, the next witness, admitted taking part in an assault on Charity Cox and pleading delinquent in a juvenile proceeding for her part. She met McCoy once at a social occasion.

Kama Nuñez, testifying next, admitted being a member of the Bratz and having had taken part in the assault on Charity Cox. Ms. Nuñez was present at a barbecue where she met Jerry McCoy. She recalled McCoy saying something about the Bratz forming alliances, or clicking-up, with other gangs. Ms. Nuñez understood the statement to mean the Bratz could have others to back them, if they needed it, or merely getting more friends and socializing with others to prevent violence between groups. Nuñez also testified that she heard McCoy say those who put down the neighborhood should be warned not to do so. Nuñez also was impeached into recalling she saw McCoy at a court-in, or initiation, of someone nicknamed Chappo. She could not recall McCoy doing anything there.

The next witness, Cherity Cox,[2] recalled Chappo's court-in, and testified he received

[2] Cherity Cox was involved in the drive-by shooting death of a young woman on September 24, 1994--a month after her testimony in this case. She was convicted of first-degree murder in this gang-related killing on December 14, 1995. She was sentenced, on

a black eye, bloody lip and a nose bleed. Cox also testified that she was with two other Bratz members "last summer" when one of them shot a gun out the window of the car in which they were driving and at another car.

Cox testified she heard McCoy make statements "about how a gang is organized, how it conducts itself." She attributed to McCoy statements that the Bratz members needed to make the Bratz stronger, that the gang needed officers and more graffiti, that members needed to make people listen to them and do what they say, that they needed to recruit strong members and discard the weak. Cox then testified that McCoy set aside the Nietzschean diatribe and added that the Bratz needed officers and a kitty for barbecue, bail, t-shirts, and drugs.

McCoy impeached Cox with evidence she lied about her tattoos, and lied to the police about the assault. Cox admitted she had falsely accused McCoy before, telling police he had asked her to bury a gun when, in fact, that never happened. Finally Cox admitted to misleading investigators about the case as recently as a few days before trial.

Jessica Ruiz testified to hearing Jerry McCoy talk about electing officers, forming alliances with other gangs, and creating some sort of treasury. On cross-examination, however, Ms. Ruiz admitted McCoy was talking more about the way the gang he had been a member of in California was run. Ruiz added that what McCoy was talking about was

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January 17, 1996, to twenty-five years to life in prison. Cox's defense was coercion; she claimed her confession was a lie and the result of threats from a codefendant.

fighting less, getting together and having barbecues, and having pride in one's self.

Christina Hernandez next testified, and recalled Jerry McCoy complaining that the Bratz were too violent and their interests would be best served by no longer fighting with other groups.

Following a verdict of guilty in the Pima County Superior Court, McCoy exhausted his state remedies. He petitioned the United States District Court for the District of Arizona for habeas corpus relief. The district court, after reviewing the state court record, found the facts of the state court trial showed there was no evidence that McCoy specifically intended anything he said to promote the commission of a felony by the Bratz. It further found there was insufficient evidence to prove the Bratz was a criminal syndicate or that it or its members had committed a felony at McCoy's behest.

The Ninth Circuit Court of Appeals, following *de novo* review of the district court's decision, upheld the district court's granting of the writ of habeas corpus. Holding that the evidence from trial concerning McCoy's speech to the gang members showed that the speech was, at most, "mere abstract advocacy of lawfulness" and was not an intentional effort to promote or further illegal activity, that court found the speech protected by the first amendment to the Constitution of the United States. As the only evidence tending to show that McCoy directed or advised the gang was the protected speech, the Ninth Circuit concluded by affirming the district court's granting of the writ.

REASONS WHY THE PETITION SHOULD BE DENIED

Stewart's petition before this Court presents a case limited to particular facts as a blanket indictment of an Arizona criminal statute. The Ninth Circuit Court of Appeals, following well established precedent from this Court and others, held that in this one case, the evidence before the trial court was speech protected by the first amendment to the Constitution of the United States. The Ninth Circuit properly applied long-accepted principles of first amendment jurisprudence to the facts of the case to hold that McCoy could not be convicted of the crime charged based on what he was heard saying to or about the Bratz.

The Ninth Circuit's Decision in this Case Correctly Applies First Amendment Precedent.

Petitioner Stewart argues in its petition that the Ninth Circuit, applying *Brandenburg v. Ohio*, 395 U.S. 444 (1969), found unconstitutional the Arizona statute in question, A.R.S. § 13-2308(A)(3). The Ninth Circuit, to the contrary, held that McCoy's speech was "[f]ar from demonstrating a specific intent to further illegal goals." It was more "abstract advocacy of lawlessness." *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir.2002). Thus, the opinion, while analyzing the reach of the first amendment, found insufficient evidence to sustain the Arizona conviction. It did not negate the statute itself.

Petitioner challenges the Ninth Circuit's interpretation of the "imminent lawless action" component of *Brandenburg*, arguing that under other decisions McCoy's conduct could be seen as unprotected. To support its argument, he cites a recent Ninth Circuit

opinion defining "threat," as used in 18 U.S.C. § 248. While Jerry McCoy has no disagreement with Stewart's statement of the definition of threat reached by the Ninth Circuit, he does not see how it applies to his case.

Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir.2002), the case cited by Stewart, clearly distinguishes a "threat" from advocating, inciting or producing lawless action. It continues to interpret *Brandenburg* and progeny as protecting speech that advocates violence when that speech is not directed at producing imminent lawlessness.

> *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), makes it clear that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action. So do *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (overturning disorderly conduct conviction of antiwar protestor who yelled "We'll take the fucking street later (or again)"), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.
>
> However, while advocating violence is protected, threatening a person with violence is not. In *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), the Court explicitly distinguished between political hyperbole, which is protected, and true threats, which are not. Considering how to construe a statute which prohibited "knowingly and willfully ... (making) any threat to take the life of or to inflict bodily harm upon the President," the Court admonished that any statute which criminalizes a form of pure speech "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 705, 707, 89 S.Ct. 1399. In that case, an 18-year old war protester told a discussion group of other young people at a public rally on the Washington Monument grounds: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday

> coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706, 89 S.Ct. 1399. His audience laughed. Taken in context, and given the conditional nature of the statement and the reaction of the listeners, the Court concluded that the speech could not be interpreted other than as "a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708, 89 S.Ct. 1399. Accordingly, it ordered judgment entered for Watts. 290 F.3d 1058 at 1071-1072.

Nowhere in *Planned Parenthood* does the Ninth Circuit change its definition of imminent as it applies to first amendment protections. It simply distinguishes "threat," as defined in the particular federal statute, as being a different creature than the violence or lawlessness discussed in *Brandenburg*.

Petitioner Stewart urges this Court to expand the Eighth Circuit's decision in *United States v. Buttorff*, 572 F.2d 619 (8th Cir.1978), to apply to the matter now before the Court. *Buttorff* upheld the convictions of tax protestors, on aiding and abetting charges, for telling groups of disgruntled citizens how to avoid paying income tax. The Eighth Circuit made no new definition of "imminent," as Stewart alleges. Rather, they found that the "how-to" advice given by Buttorff and others actually caused several persons to file fraudulent tax returns. And, in other instances, Buttorff and his cohorts actually helped fill out forms and were paid for their advice.

The Ninth Circuit recognized the insight advanced in *Buttorff*. In a footnote in the *McCoy* opinion, the court reasoned that McCoy's argument "would, or course, be undermined if the state could prove that the speech actually caused imminent lawless action." Contrary to Stewart's arguments, the Ninth Circuit laid down no time requirement for

"imminent." It correctly stated the matter would be different if McCoy actually caused someone to commit a crime, without setting a time limit.

> McCoy's argument that his speech was mere abstract advocacy would, of course, be undermined if the state could prove that the speech actually caused imminent lawless action. Here, however, McCoy correctly observes that his words did not actually incite anyone to commit a crime. There is no evidence in the record that the Bratz engaged in any crime as a result of his advice. Indeed, there is no evidence that McCoy's speech played any part at all in any crime committed by the Bratz. Cynthia Felix, a Bratz member, testified that she didn't think the Bratz implemented McCoy's idea about how to court-out girls. No one testified that the Bratz took McCoy's advice about tagging up the neighborhood. And while the evidence demonstrated that members of the Bratz were involved in crimes, nothing indicates that their criminal activity was in any way inspired by or "proximate" to McCoy's speech. *McCoy, supra*, 282 F.3d at 632, n.6.

Stewart fails to distinguish those cases where crime involves speech, such as *United States v. Barnett*, 667 F.2d 835 (9th Cir.1982), and cases such as this where the state tries to criminalize speech. The Ninth Circuit, in *Barnett*, made mention of the difference.

> The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction. The use of a printed message to a bank teller requesting money coupled with a threat of violence, the placing of a false representation in a written contract, the forging of a check, and the false statement to a government official, are all familiar acts which constitute crimes despite the use of speech as an instrumentality for the commission thereof. *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir.1982).

While Stewart tries to use *Barnett* to support his argument that McCoy's speech was criminal, that case does nothing to further his cause. It merely held that a recipe for an illegal drug is not protected from seizure by reason if its being a printed document. In dicta, the

court added that the written or printed nature of an illegal act does not protect it from prosecution.

> We are not here concerned with the defense Barnett may interpose at his trial; our concern is, rather, the existence of probable cause to support a search. To the extent, however, that Barnett appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct. *Barnett*, 667 F.2d at 843.

Petitioner Stewart fails to wrest McCoy's case into the arena of those cases where a court of appeals found words to be criminal. His citations and argument simply reinforce the Ninth Circuit's correct decision that Jerry McCoy did not cause any one to commit a crime nor try to incite any one to criminal conduct.

Stewart's Play to Patriotism Fails.

As a last ditch effort to persuade this Court to grant certiorari to his cause, petitioner Stewart suggests this country will not be safe from terrorism if the Court allows *McCoy v. Stewart* to stand. Stewart's argument is misplaced.

Should terrorism succeed in eroding the freedom enjoyed in this country, it wins. Should freedom of speech be abridged because of terrorist acts, we bow to its threat. The message this country must send to those who hate it and attack it is that we will not be bent to their demands. We will not give up that which makes us the envy of the world because misguided zealots have succeeded in destroying buildings and taking lives.

Stewart's disingenuous play on our patriotic sympathies belittles his cause and smacks

of desperation. He seemingly suggests a new McCarthyism, where we can no longer be free to say what we think. And, he suggests the first victim of tightened restrictions on speech should be Jerry McCoy.

CONCLUSION

Terry Stewart argues the Ninth Circuit ruled A.R.S. § 13-2308(A)(3) unconstitutional. This is not true; the court merely held that what McCoy said did not violate the statute. Stewart argues that the Ninth Circuit somehow misinterpreted *Brandenburg* and misdefined "imminent" in arriving at its affirmation of the district court. His arguments are misplaced and unpersuasive. Finally, he believes the war on terrorism should receive a new weapon–greater restrictions on speech. His proposed weapon would only aid terrorism in its attempt to cow the American spirit.

The Ninth Circuit correctly decided *McCoy v. Stewart*. There is no reason to grant certiorari in this matter.

Respectfully submitted this 2nd day of August, 2002.

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(3)

SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* JERRY DEAN McCOY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02–20. Decided October 21, 2002

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is denied.

Statement of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari:

An Arizona jury found respondent guilty of participating in a criminal syndicate, and the trial court sentenced him to a term of 15 years' imprisonment. After his conviction was affirmed by the Arizona Court of Appeals, the Federal District Court granted his petition for a writ of habeas corpus, and the Court of Appeals for the Ninth Circuit affirmed the order releasing him from custody. The harsh sentence for a relatively minor offense provides a permissible justification for this Court's discretionary decision to deny the warden's petition for certiorari. Nevertheless, the issue raised by her petition has sufficient importance to merit comment.

The specific crime committed by respondent was giving advice to members of a street gang. In the words of the relevant Arizona statute, he was guilty of: "Furnishing advice or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of a criminal syndicate."[1] The evidence showed that he had been a

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[1] Ariz. Rev. Stat. Ann. §13–2308(A)(3) (West 2001).

3 pp

member of a street gang in California before moving to Arizona, and that at two social gatherings he gave several members of a Tucson gang specific advice on how to operate their gang.[2] The state appellate court concluded that the evidence was sufficient to prove his knowledge of the Tucson gang's criminal activities and his intent to promote those activities. It also rejected respondent's contention that the statute violated the First Amendment because it prohibited constitutionally protected speech.

The federal courts both concluded, however, that respondent's speech was protected by that Amendment. Relying primarily on *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)*, and *Hess* v. *Indiana*, 414 U. S. 105 (1973) *(per curiam)*, the Court of Appeals held that respondent's speech "was mere abstract advocacy" that was not constitutionally proscribable because it did not incite "imminent" lawless action.[3] Given the specific character of respondent's advisory comments, that holding is surely debatable. But whether right or wrong, it raises a most

[2] "Appellant moved to Tucson from California, where he had been a member of a gang since the 1980s. In Tucson, he became acquainted with his girlfriend's son and a number of his friends who belonged to a gang called the 'Bratz.' Several Bratz members testified that appellant was present at a barbecue at the son's house attended by a number of Bratz members and that he spoke to them about his experiences in the California gang. He advised them to formalize their gang by electing officers, collecting money to establish a bail fund for members, and spray painting more gang graffiti to make their presence known in their territory. He also advised them to 'jump in' more loyal members and 'jump out' those who were not loyal. There was testimony explaining that 'jumping' or 'courting' meant initiating a new member or removing a current member by means of a group beating in which a number of members participated in beating or kicking the person 'jumped' or 'courted.' Finally, he advised them to establish friendly relations with other gangs who would support them." *State* v. *McCoy*, 187 Ariz. 223, 224, 928 P. 2d 647, 648 (App. 1996).

[3] 282 F. 3d 626, 631 (CA9 2002).

important issue concerning the scope of our holding in *Brandenburg*, for our opinion expressly encompassed nothing more than "mere advocacy," 395 U. S., at 449.

The principle identified in our *Brandenburg* opinion is that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. While the requirement that the consequence be "imminent" is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function. As our cases have long identified, the First Amendment does not prevent restrictions on speech that have "clear support in public danger." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). Long range planning of criminal enterprises—which may include oral advice, training exercises, and perhaps the preparation of written materials—involves speech that should not be glibly characterized as mere "advocacy" and certainly may create significant public danger. Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech. Our denial of certiorari in this case should not be taken as an endorsement of the reasoning of the Court of Appeals.